Supreme Court, U.S.
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No.

IN THE
Supreme Court Of The United States

ROBERT LOUIS MARRAMA,

Petitioner

v.

CITIZENS BANK OF MASSACHUSETTS,
And MARK G. DeGIACOMO, CHAPTER 7 TRUSTEE

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The First Circuit Court of Appeals affirmed the decision of the Bankruptcy Appellate Panel for the First Circuit which affirmed the decision of the Bankruptcy Court for the District of Massachusetts denying the request of the Petitioner, Robert Louis Marrama, to convert his bankruptcy case from Chapter 7 to Chapter 13. The bankruptcy court held, in essence, that notwithstanding the plain language of the statute and of the legislative history, the right to convert a case from one chapter to another, found in 11 USC §706(a), can be denied in the bankruptcy court's discretion if the bankruptcy court determines that the request was made in bad faith. In a decision that focused on factual determinations, the Bankruptcy Appellate Panel affirmed. The First Circuit Court of Appeals focused on statutory construction and determined that although the legislative history says that the right to convert is "absolute", the right can be denied in circumstances such as those presented in this case.

The question presented, therefore, is whether the right to convert a chapter 7 bankruptcy case to another chapter can be denied notwithstanding the plain language of the statute and the legislative history.

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OPINION BELOW

The bankruptcy court did not issue a written opinion. The opinion of the Bankruptcy Appellate Panel is reported at In re Marrama (Marrama, Appellant, v. Citizens Bank of Massachusetts, and Mark DeGiacomo, Chapter 7 Trustee, Appellees), 313 B.R. 525 (1st Cir. BAP, 2004). The decision of the Bankruptcy Appellate Panel denying a motion for rehearing was not reported. The opinion of the First Circuit Court of Appeals is reported under the same title at 430 F. 3d 474 (1st Cir. 2005).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1).

The opinion of the First Circuit Court of Appeals was rendered on October 31, 2005.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

TITLE 11. BANKRUPTCY · UNITED STATES CODE
Chapter 7. Liquidation
Subchapter I. Officers and Administration

11 USC §706. Conversion
(a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.
(b) On request of a party in interest and after notice and a

hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time.

(c) The court may not convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests such conversion.

(d) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

STATEMENT OF THE CASE

The bankruptcy case was commenced on March 11, 2003. Mark DeGiacomo was appointed trustee (hereinafter "DeGiacomo"). The Meeting of Creditors required by 11 USC §341 commenced on April 24, 2003, and was continued several times, finally concluding on November 18, 2003. At the first meeting, DeGiacomo recommended certain amendments to the schedules, which eventually were made.

The bankruptcy case resulted from the breakdown of a business relationship that Marrama had with Citizens Bank of Massachusetts, or its predecessors, for about 14 years. Citizens had provided a line or lines of credit to Marrama's business, RLM Flooring, Inc. At some point, Marrama requested an increase in his credit line to help him cope with a temporary cash flow problem. In response, Citizens refused the request and instead called in its note, demanding immediate payment in full. When payment was not forthcoming, Citizens commenced litigation in Massachusetts Superior Court for Suffolk County. During the course of pre-trial proceedings, Citizens obtained permission of the Superior Court to take possession of all of RLM's assets, including accounts receivable, thereby effectively shutting down the business. Having been rendered unemployed, Marrama sought bankruptcy relief in order to gain "breathing room" and develop a source of income. Being then unemployed, Marrama did not qualify to file under Chapter 13, as he did not have a regular income as required by 11 USC §109(e). The state court litigation never went to trial.

Among Marrama's assets was a "summer home" in York, Maine, and his permanent residence in Gloucester, Massachusetts. Although the Maine property was owned in a spendthrift trust, the bankruptcy court determined that the

trust was not valid[1]. Accordingly, DeGiacomo, as chapter 7 trustee, liquidated that property. On the date of the bankruptcy petition, Marrama was residing in the Maine property. Thus, Citizens took the position that Marrama's homestead exemption for the Gloucester property, claimed pursuant to state law, was invalid. In a published decision, In re Marrama, 307 B.R. 332 (Bkrtcy.D.Mass. 2004), the bankruptcy court overruled Citizens' position. Thus Marrama is presently living in Gloucester, Maine, and that property is properly exempted from the bankruptcy estate.

Once Marrama was able to find employment[2], he sought to convert the case to Chapter 13 so that he could cure the arrears on his mortgages that arose due to the financial problems that arose from the Citizens litigation, and thereby keep his homes. Both the Trustee and Citizens objected to the conversion, claiming essentially that the request was made in bad faith; there was no allegation that Marrama was not qualified to be a debtor under chapter 13. The bankruptcy court, alluding to one of its own published decisions, denied conversion. On intermediate appeal, the Bankruptcy Appellate Panel affirmed, and denied a motion for rehearing.

A timely appeal to the First Circuit followed. The First Circuit affirmed.

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[1] This statement results from the fact that the bankruptcy court allowed DeGiacomo's motion to revoke the trust. The motion was allowed without a hearing, so the bankruptcy court's reasoning is not known with certainty, but that the bankruptcy court so determined is a reasonable inference from allowance of the motion.

[2] His family has been in the flooring business for at least two generations. Thus he was able to find employment with a brother's flooring company.

REASONS FOR ALLOWANCE OF THE PETITION

Whether a debtor in a chapter 7 bankruptcy case has the absolute right to convert the case to another chapter is an important question, implicating a substantive right granted to debtors by congress as well as the public policy behind the grant of the right. Even the most cursory review of decisions on this issue, at all judicial levels, will disclose that the law is in complete disarray.

For example, the decision of the First Circuit in this case primarily relied on In re Finney, 992 F.2d 43, 45 (4th Cir.1993) and Martin v. Martin (In re Martin), 880 F.2d 857, 859 (5th Cir.1989). In fact, most cases – on both sides of the question – rely on the Fifth Circuit's decision in Martin. Recently, however, the Fifth Circuit had occasion to revisit the issue and to interpret the Martin decision. *See* In the Matter of Pequeno (Pequeno v. Schmidt, Trustee), 126 Fed. Appx. 158 (2005). Although this appears to be an otherwise unpublished decision, it is directly on point and highly material to the present petition, and should be considered by this Court. In this decision, the Fifth Circuit recognized that there is *dicta* in the Martin decision that could be interpreted otherwise, but the court nonetheless stated that "[t]he statutory language makes it clear that the right to convert is absolute and unqualified." Id. at 162.

Faced with this question in a somewhat different context, the Bankruptcy Appellate Panel for the Tenth Circuit also held that the right is absolute and can be exercised *even after* the debtor has received a discharge under Chapter 7. *See* In re Miller, et al, 303 B.R. 471 (10th Cir., 2003). In that case, the Panel found "that a bankruptcy court may not exercise its discretion to evaluate other circumstances when considering a motion to convert under §706, but is restricted

to considering whether the debtor meets the requirements delineated in the plain language of the statute."

The Sixth Circuit disagreed with both the Fifth Circuit Court of Appeals and the Tenth Circuit Bankruptcy Appellate Panel. In re Copper, 426 F.3d 810 (6th Cir. 2005). The Sixth Circuit expressly recognized the split of authority and that "fair arguments can be made for either position." Id. at 817. Nonetheless, the Sixth Circuit concluded that conversion may be denied in the absence of good faith.

Ultimately, the petitioner respectfully suggests that the opinion of the Ninth Circuit Bankruptcy Appellate panel is highly informative and persuasive, as it collects cases on both sides of the issue and thoroughly analyzes the statute and the related Federal Rule of Bankruptcy Procedure. *See* In re Croston, 313 B.R. 447 (9th Cir. BAP 2004). That panel "agree[d] with the courts that view the right to convert as absolute", and further noted that "[s]ometimes, a problem debtor surprises everyone and winds up confirming and performing a chapter 13 plan that pays creditors more than they would receive in chapter 7 and leaves everyone better off." *Cf.* In re Porras, 188 BR 375 (Bkrtcy.W.D.Tx 1995) (holding that the right to convert from Chapter 7 to Chapter 11 is absolute; collecting cases).

The legislative history of 11 USC §706 makes it clear that the right is absolute:

> Subsection (a) of this section gives the debtor the one-time *absolute* right of conversion of a liquidation case to a reorganization or individual repayment plan case. If the case has already once been converted from Chapter 11 or 13 to Chapter 7, then the debtor does not have that right. The policy of the provisions is that the debtor should always be given the opportunity to repay his debts.

(emphasis added) H.R.Rep. No. 95-595, at 380 (1977); S.Rep. No. 95-989, at 94 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880. The First Circuit, however, limited the right to "honest" debtors, that is, debtors that do not appear to the court to be "manipulating" the bankruptcy code[3] as perceived by the court. However, as the decisions on the other side of the issue make clear, there are ways of remedying such manipulation without thwarting the plainly-expressed will of Congress. *See, e.g.*, Croston and Porras, *supra*.

For these reasons, certiorari is warranted to resolve the split among the circuits on this issue, and bring order to the disarray that is reflected by the plethora of decisions from bankruptcy courts, Bankruptcy Appellate Panels, District Courts, and Circuit Courts.

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[3] The petitioner, of course, adamantly denies any dishonesty in these proceedings, and the record is devoid of any competent evidence to the contrary since the bankruptcy court did not hold an evidentiary hearing. The First Circuit justified this by saying that the petitioner never requested an evidentiary hearing. While a trial court plainly may render judgment summarily when there are no material facts in dispute, *see* Fed.R.Civ.P. 56, the existence of a dispute over material facts requires an evidentiary hearing even if one has not been expressly requested. Marrama's "intent" is plainly a material, disputed fact.

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,
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APPENDIX

313 B.R. 525

United States Bankruptcy Appellate Panel
of the First Circuit.
In re Robert Louis MARRAMA, Debtor.
Robert Louis Marrama, Appellant,
v.
Citizens Bank of Massachusetts, and Mark DeGiacomo,
Chapter 7 Trustee, Appellees.

BAP No. MB 04-001.
Bankruptcy No. 03-11987-WCH.
Sept. 9, 2004.

Background: Order was entered by the United States Bankruptcy Court for the District of Massachusetts, William C. Hillman, J., denying verified notice of conversion filed by Chapter 7 debtor. Debtor appealed.

Holdings: The Bankruptcy Appellate Panel, Lamoutte, J., held that:
(1) Chapter 7 debtor whose bankruptcy case had not previously been converted did not have absolute right to convert case to one under Chapter 13, but only a presumptive right that could be denied for extreme circumstances; and
(2) "extreme circumstances" existed sufficient to justify denying Chapter 7 debtor's purported exercise of one-time right to convert case.

Affirmed.

*526 David G. Baker, Charlestown, MA, on brief, for Appellant.
Jack J. Mikels, Quincy, MA, Michael A. Wirtz, Boston, MA, Janell E. DeGennaro, on brief, for Appellee Citizens Bank of Massachusetts.

Mark G. DeGiacomo, Boston, MA, Olga L. Bogdanov, Worcester, MA, on brief, for Appellee Mark G. DeGiacomo as Chapter 7 Trustee.

Before LAMOUTTE, VAUGHN, and CARLO, United States Bankruptcy Appellate Panel Judges.

LAMOUTTE, Bankruptcy Judge.

Robert Louis Marrama (the "Debtor" or the "Appellant") appeals the August 27, 2003 order (the "Order") entered by the United States Bankruptcy Court for the District of Massachusetts (the "bankruptcy court") denying his Verified Notice of Conversion to Chapter 13 (the "Notice"). The issue before the Panel is two-fold; that is, whether the bankruptcy court may deny a Chapter 7 debtor the right to convert a Chapter 7 case to Chapter 13, and if so, ***527** whether the bankruptcy court was correct in doing so under the particular facts of this case. We affirm.

BACKGROUND

On March 11, 2003, the Debtor filed a voluntary Chapter 7 petition and schedules. App. at 17. [FN1] Schedule A listed a "Residence in Gloucester, MA" (the "Massachusetts Property") as the Debtor's only real property. On Schedule B, the Debtor answered Question 18 by stating: "Debtor is 100% beneficiary of Bo-Mar Realty Trust [(the 'Trust')] the res of which is real property in Maine in which the debtor intends to live. Trust is a spendthrift trust." The current market value of the Debtor's interest in the Trust was listed as zero. On Schedule C, the Debtor claimed a homestead exemption in the Massachusetts Property, listing $300,000 as the maximum value of the claimed exemption, and $200,000 as the current market value of the property without deducting the

exemption. Schedule C also provided: "The beneficial interest in the Bo-Mar Realty Trust is not property of the estate pursuant to 11 U.S.C. § 541(c)." Schedule I stated no income generated by real property, and listed a total combined monthly income of $5,762. Schedule J included total monthly expenses of $4,925.95. On March 24, 2003, the Debtor filed a motion to avoid the liens on the Massachusetts Property, arguing that the same impaired his homestead exemption.

FN1. Citations to the Appendix refer to Appellant's Appendix, attached to his Brief. Although the pages of the Appendix are not sequentially numbered, said page numbers have been calculated by the Panel and the contents of the Appendix are referred to accordingly.

The § 341 meeting of creditors commenced on April 24, 2003, was continued over the course of several months, and concluded in November, 2003. *Id.* At the April 24, 2003 creditors' meeting, [FN2] the Debtor testified that he was currently residing at 47 Norton Avenue in York, Maine (the "Maine Property"), and that he had been doing so for a couple of months. Appellee's App. at 33. The Debtor further testified that his Massachusetts Property serves as rental property, generating a total of $2,150.00 a month beginning on May 1, 2003. [FN3] *Id.* at 34.

FN2. Although the transcript of the April 24, 2003 creditors' meeting was not before the bankruptcy court when it denied the Notice of Conversion, the bankruptcy court did hear arguments pertaining to matters that arose in that meeting. This Panel has previously allowed the transcript of a § 341 creditors' meeting to be part of the record on appeal where

matters pertaining to that meeting were presented in arguments to the bankruptcy court. *See* Cabral v. Shamban (In re Cabral), 285 B.R. 563 (1st Cir. BAP 2002). In the *Cabral* case, the Panel had issued a pre-argument order denying the Appellee's motion to strike the transcript from the record.

FN3. The Massachusetts Property consists of two units; one renting for $1,500.00 and the other for $600.00. Appellee's App. at 34.

The Debtor testified that he had purchased the Maine Property several years ago, and had later conveyed it to the Trust for no consideration. *Id.* at 18, 37. The Debtor referred to the property as belonging to him, saying "I have a piece of property in Maine." *Id.* at 6. His attorney corrected him, explaining, "[t]hat's actually owned by the trust, right?" *Id.* When asked why he transferred the Maine Property into the Trust, the Debtor testified that he was trying to protect it. *Id.* at 37. The Debtor is the sole beneficiary of the Trust, and his girlfriend is the trustee. *Id.* at 16. The Trust contains a spendthrift clause and is revocable. *See id.* at 47. The transfer of the Maine Property to the ***528** Trust was not disclosed in the Statement of Financial Affairs.

On June 23, 2003, the Debtor filed a Verified Notice of Conversion to Chapter 13 (the "Notice of Conversion"). App. at 17. In response to the Notice of Conversion, the Appellees each filed opposition pleadings. *Id.* Pointing out that the Debtor had claimed a homestead exemption in property where he did not reside, and that the Debtor had transferred the Maine Property into a trust for his own benefit which he failed to disclose on his bankruptcy schedules, the Trustee's

opposition argued that the Debtor's request for conversion was made in bad faith with an intent to prevent the Trustee's recovery of assets on behalf of the estate. *Id.* at 2. The Trustee's opposition stated that the Debtor did not disclose the transfer of the Maine Property in response to Question 10 of the Statement of Financial Affairs or anywhere else in his bankruptcy petition. *Id.* The Debtor responded to the Trustee's opposition, denying the allegations of bad faith and asserting that the Maine Property had been properly disclosed on Schedule B. *Id.* at 6.

Citizens Bank, like the Trustee, argued that the Debtor's request for conversion lacked good faith, and added that such a conversion would result in abuse of the bankruptcy process. *Id.* at 9. In addition to the Trustee's arguments regarding the Maine Property, Citizens Bank's opposition asserted that the Debtor's Schedule I failed to disclose income generated by rental of the Massachusetts Property. *Id.* Citizens Bank's opposition further alleged that the Debtor had participated in improper, and possibly illegal, activity in connection with his company's assets, and that the Debtor had been uncooperative with regard to a civil action Citizens Bank had commenced to enforce collection of its loans and obtain equitable relief to seize the business records and manage the collection of the company's receivables. *Id.*

On August 11, 2003, the Debtor filed amended Schedules I and J. Amended Schedule I listed income from rental property of $1,500, bringing the Debtor's total combined monthly income up to $7,184.77. Amended Schedule J reflected an increase in monthly expenses, with a new total of $5,828.00.

On August 27, 2003, the bankruptcy court held a hearing on the Notice of Conversion (the "Hearing"). At the Hearing, the Appellees reiterated the arguments presented in their oppositions. *Id.* at 33. Specifically, the Trustee alleged that the Debtor failed to disclose on his Statement of Financial Affairs the transfer of his Maine Property into the Trust within a year of filing bankruptcy for the purpose of protecting it. The Trustee alleged that the transfer was a fraudulent transfer. The Trustee further argued that the Debtor failed to disclose in his schedules receipt of rental income from the Massachusetts Property or entitlement to a tax refund of $8,700 that the Trustee had recently learned about. The Trustee asserted that the Debtor decided to convert to Chapter 13 only after the Trustee informed him at the § 341 meeting that the Trustee would seek to recover the $85,000 of equity in the Maine Property.

Citizens Bank summarized the contentious state court litigation between itself and the Debtor, which was stayed at the discovery stage by the Debtor's bankruptcy filing. Citizens Bank explained that the Debtor had filed criminal complaints against two bank vice-presidents and the bank's attorney because they went to shut down the Debtor's company under court order. The bank further explained that the Debtor had avoided giving interrogatory or deposition testimony in the state court action as well as during his 2004 examination in the bankruptcy proceeding ***529** by asserting his Fifth Amendment privilege.

The Debtor denied the allegations of bad faith, and argued that any omissions were inadvertent or of no harm to the estate. *Id.* Specifically, the Debtor explained that he had not started receiving rental income from the Massachusetts

Property until after he filed his petition. The Debtor's attorney attributed the Debtor's failure to disclose the transfer of the Maine Property to his own scrivener's error, explaining that he had known about the transfer, but had inadvertently omitted it from the Statement of Financial Affairs. Regarding the tax refund, the Debtor asserted that he learned about it the same time the Trustee did. The Debtor also explained that he had not sought conversion to Chapter 13 because the Trustee was going to pursue recovery of assets; rather, he had sought conversion because he became employed subsequent to the filing of his Chapter 7 petition.

The bankruptcy court reasoned that there is no "oops" defense to concealment, and that filers have an obligation to provide accurate information. *Id.* The bankruptcy court further found that there is "a major presumption of bad faith when you have a grantor trust within a year of the bankruptcy and the property is not disclosed." *Id.* Comparing the present case to the recent *Fleury* [FN4] decision, the bankruptcy court concluded that "[t]his is a bad faith case," and denied the conversion. *Id.* This appeal followed.

FN4. *See In re Fleury*, 294 B.R. 1 (Bankr.D.Mass.2003), *aff'd*, 306 B.R. 722 (1st Cir. BAP 2004). In *Fleury*, the bankruptcy court found that a Chapter 13 debtor had filed her petition in "bad faith" where she had failed to pay any divorce-related debt through a previous Chapter 13 case that had dissipated more than $350,000. Based on the finding of "bad faith," the bankruptcy court dismissed the case with prejudice to the debtor's ability to re-file for 360 days.

JURISDICTION

[1] [2] [3] A bankruptcy appellate panel may hear appeals from "final judgments, orders and decrees pursuant to 28 U.S.C. § 158(a)(1), or with leave of the court, from interlocutory orders and decrees pursuant to 28 U.S.C. § 158 (a)(3)." *Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.)*, 218 B.R. 643, 645 (1st Cir. BAP 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Id.* at 646 (citations omitted). An interlocutory order "only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." *Id.* (quoting *In re American Colonial Broad. Corp.*, 758 F.2d 794, 801 (1st Cir. 1985)). A bankruptcy appellate panel is duty-bound to determine its jurisdiction before proceeding to the merits even if not raised by the litigants. *See In re George E. Bumpus, Jr. Constr. Co.*, 226 B.R. 724 (1st Cir. BAP 1998).

[4] The Panel finds that it has jurisdiction over this appeal pursuant to § 158(a)(1) as the bankruptcy court's order denying conversion to Chapter 13 constitutes a final order. *See Kuntz v. Shambam (In re Kuntz)*, 233 B.R. 580, 582 (1st Cir. BAP 1999).

STANDARD OF REVIEW

[5] [6] Appellate courts reviewing an appeal from the bankruptcy court generally apply the clearly erroneous standard to findings of fact and *de novo* review to conclusions of law. *See* ****530** T I Fed. Credit Union v. DelBonis*, 72 F.3d 921, 928 (1st Cir.1995); *Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714, 719-20, n. 8 (1st Cir.1994). Whether a bankruptcy court properly denied a debtor's request for

conversion is a question of law requiring *de novo* review on appeal. *Kuntz*, 233 B.R. at 582.

DISCUSSION

I. Is there an absolute right to convert a Chapter 7 case to Chapter 13?

[7] Section 706(a) of the Bankruptcy Code provides that:

> The [chapter 7] debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

11 U.S.C. § 706(a). The legislative history of § 706(a) characterizes the debtor's right to convert as "absolute," stating that "[s]ubsection (a) of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case." S.Rep. No. 95-989, at 94 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880. This history has been found to reflect Congress' desire to encourage debtors to choose one of the reorganization chapters over Chapter 7. *Matter of Martin*, 880 F.2d 857, 859 (5th Cir.1989) ("The policy of the provision is that the debtor should always be given the opportunity to repay his debts.") (quoting H.Rep. No. 95-595, 95th Cong.2d Sess. 380, U.S.Code Cong. & Admin.News 1978, 5963, 6336).

However, this Panel has previously held that a debtor's one-time right to convert a Chapter 7 case to Chapter 13 is not absolute, but may be denied in extreme circumstances constituting bad faith. *See Kuntz*, 233 B.R. at 583 (citing

Matter of Martin, 880 F.2d at 859, and *In re Calder*, 93 B.R. 739 (Bankr.D.Utah 1988)). It noted that "consistent with the underlying policy of § 706(a), courts which have considered the debtor's right to conversion vis-a-vis his actions during the Chapter 7 case have required a substantial showing prior to denying the request." *Id.* at 583. The Panel concluded that the circumstances in *Kuntz* were not sufficiently egregious to warrant a denial of conversion. *Id.* at 585.

In a subsequent decision, this Panel, relying on the rationale in *Kuntz*, held that the unrebutted facts were not only sufficient to raise an inference of bad faith under 11 U.S.C. § 1307(c), but also constituted "extreme circumstances" sufficient to deny conversion from Chapter 7 to Chapter 13 under § 706(a). *See Cabral v. Shamban (In re Cabral)*, 285 B.R. 563, 575 (1st Cir. BAP 2002). The factors found to constitute bad faith and extreme circumstances included the debtor giving misleading testimony at the § 341 meeting of creditors, substantial differences between the debtor's original and amended schedules, and the omission in the Chapter 13 plan and liquidation analysis of the likelihood of a substantial settlement offer of a personal injury claim. *Id.*

There is a split of authority among courts which have considered the issue as to whether the debtor's right to convert a case from Chapter 7 to Chapter 13 pursuant to 11 U.S.C. § 706(a) is "absolute" or subject to some measure of judicial discretion. While some courts and authors have characterized the different positions as the majority view or minority view, the Hon. David S. Kennedy has commented that "[i]t is somewhat difficult to determine at this time in the development of the decisional law which view actually represents the majority or minority of courts, especially

considering the fact that conflicting ***531** reported opinions substantiating the statutory right as an absolute one or qualified right seemingly appear in almost every new bankruptcy advance sheet." David S. Kennedy, "Current Controversies Centering Around a Debtor's Statutory and Procedural Right to Convert an Originally Filed Chapter 7 Case to a Case under Chapter 11 or 13 of the Bankruptcy Code and Related Matters", *18th Annual Current Developments in Hot & Emerging Areas,* Commercial Law League of America, October 16, 2003 (citing *In re Ponzini,* 277 B.R. 399, 404 n. 3 (Bankr.E.D.Ark.2002) ("[T]his Court's review of recent rulings on this issue reveal a larger number of courts adopting what was previously referred to as the minority view (*i.e.* the view that a debtor does not have an absolute right to convert under § 706(a)), such that it is no longer clear which is the majority or minority view.")).

A substantial number of cases, including those from this Panel which have addressed the issue, have held that the right to convert from Chapter 7 to Chapter 13 is absolute only in the absence of extreme circumstances. *See, e.g., Matter of Martin,* 880 F.2d at 859 (courts refuse to interfere with right to convert in absence of extreme circumstances); *Martin v. Cox,* 213 B.R. 571 (E.D.Ark.1996), *aff'd,* 116 F.3d 480 (8th Cir.1997); *Cabral,* 285 B.R. at 575. The extreme circumstances approach requires the bankruptcy court to make a factual determination as to the existence of extreme circumstances, such as bad faith, abuse of process, or other gross inequity, and such cases typically involve egregious conduct on the part of the debtor, who is seeking to use the bankruptcy process abusively and selfishly rather than for its intended purpose. Kennedy, *supra,* at 296.

Other courts look at the totality of the circumstances surrounding the debtor's request to convert his case, balancing the purpose of, and policies underlying, Chapter 13, as well as the debtor's motivation in seeking conversion, and the reasons the debtor did not originally file under Chapter 13. Kennedy, *supra,* at 300 (citing *In re Gallagher,* 283 B.R. 604, 606 (Bankr.M.D.Fla.2002)). This approach is similar to the extreme circumstances approach, and many of the same factors overlap. Such factors may include whether the debtor is seeking to convert in good faith; whether the debtor can propose a confirmable Chapter 13 plan; the impact of denying conversion on the debtor weighed against the prejudice to creditors by allowing conversion; the effect of conversion on the efficient administration of the bankruptcy estate; and whether conversion will further an abuse of the bankruptcy process. Kennedy, *supra,* at 301 (citing *Pakuris,* 262 B.R. 330, 335-36 (Bankr.E.D.Pa.2001)); *see also In re Marcakis,* 254 B.R. 77, 82 (Bankr.E.D.N.Y.2000) (court must consider possibility of abuse, prejudice to other parties or creditors, eligibility of the debtor, and all circumstances generally); *In re Krishnaya,* 263 B.R. 63 (Bankr.S.D.N.Y. 2001).

[8] In analyzing the debtor's good faith, [FN5] the court may consider whether the debtor has been forthcoming; whether the ***532** debtor has failed to disclose potentially beneficial interests of non-bankruptcy litigation or has omitted assets from his schedules and statements; whether disclosure was prompted by an investigation by the trustee or the filing of dischargeability litigation; and whether the debtor has made a complete, reliable and full disclosure; as well as the timing of the motion to convert-- that is, whether it occurs after the entry of the Chapter 7 discharge. Kennedy, *supra,* at 301-302

(citing *Boroff v. Tully (In re Tully)*, 818 F.2d 106, 110 (1st Cir. 1987); *In re Carter*, 285 B.R. 61, 67 (Bankr.N.D.Ga.2002); *Gallagher*, 283 B.R. at 607; *Pakuris*, 262 B.R. at 336; *In re Porter*, 276 B.R. 32, 37-38 (Bankr.D.Mass.2002) ("The Court must determine whether conversion under these circumstances is appropriate pursuant to the overall purpose and policy of the Bankruptcy Code, and although the Debtor's right to convert is nearly absolute, the matter remains within the discretion of the Court."); *In re Mosby*, 244 B.R. 79, 86 (Bankr.E.D.Va.2000); *In re Thornton*, 203 B.R. 648 (Bankr.S.D.Ohio 1996)). In *Boroff v. Tully*, the First Circuit, while noting that the statutory right to a discharge is generally construed in favor of the debtor, observed that the purpose of certain sections of the Bankruptcy Code is to make sure that "those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs" and to "insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction." 818 F.2d at 110.

FN5. The consideration of a debtor's good faith in converting a Chapter 7 case to Chapter 13 has been criticized by one commentator, who noted:

> The debtor's good faith in first filing a Chapter 7 case and then converting to Chapter 13 is most appropriately tested at confirmation under § 1325(a)(3) using the usual good-faith rules applicable in the circuit. No obvious good purpose is served by overlaying a whole new jurisprudence of good faith as a judge-imposed condition on conversion from Chapter 7 to Chapter 13.

Keith M. Lundin, 4 *Chapter 13 Bankruptcy* § 325.1 at 325-14 (3d ed.2002).

[9] [10] The Panel concludes that a bankruptcy court may use the totality of the circumstances approach to determine whether the same are extreme and warrant denial of a Chapter 7 debtor's motion to convert to Chapter 13 under § 706(a). [FN6] The plain language of § 706(a), when read together with other sections of the Bankruptcy Code and Rules [FN7], does not grant a ***533** debtor an absolute right to convert a case from Chapter 7 to Chapter 13; rather, the right to convert is presumptive and should be granted unless there are extreme circumstances showing that the debtor is abusing the jurisdiction of the bankruptcy court. While there is no specific test for determining "extreme circumstances" that constitute bad faith, one important factor is whether a debtor intentionally attempted to conceal assets from creditors. *See Cabral*, 285 B.R. at 574-75; *Kuntz*, 233 B.R. at 585.

FN6. In affirming the "totality of the circumstances" or "extreme circumstances" approach, this Panel rejects the application of § 105 to motions for conversion under § 706. While § 105 empowers the bankruptcy courts with broad equitable and discretionary powers to deal with situations not explicitly covered by the Bankruptcy Code, using § 105 to override the plain language of § 706 has been criticized by courts which hold that § 105(a) should not be used contrary to the clear wording of the Bankruptcy Code, its legislative history, and the Rules of Bankruptcy Procedure. *In re Rashid*, 97 B.R. 610, 615 (W.D.Okla.1989); *Official Comm. of Equity Sec. Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir.1987), *cert. denied*, 485 U.S. 962, 108 S.Ct. 1228, 99 L.Ed.2d 428

(1988); *United States v. Sutton*, 786 F.2d 1305, 1307-08 (5th Cir.1986). The First Circuit has stated "section 105(a) does not provide bankruptcy courts with a roving writ, much less a free hand." *Jamo v. Katahdin Federal Credit Union (In re Jamo)*, 283 F.3d 392, 403 (1st Cir.2002) (bankruptcy court lacked power to modify a reaffirmation agreement or compel the parties to enter into a judicially-crafted reaffirmation agreement). *Accord Holyoke Nursing Home, Inc. v. Health Care Fin. Admin. (In re Holyoke Nursing Home, Inc.)*, 372 F. 3d 1, 5 (1st Cir.2004) ("[T]he equitable powers of the bankruptcy court do not accord it 'a roving commission to do equity,' nor 'authorize courts to create substantive rights that are otherwise unavailable under the Code.' ") (quoting *In re Ludlow Hosp. Soc'y, Inc.*, 124 F.3d 22, 27 (1st Cir.1997)).

FN7. For example, § 706(a) states that the court "may" convert a case at any time, while § 1307(b) states that the court "shall" dismiss a case upon request of the debtor at any time; "[t]he statute's use of the verb 'may' rather than 'shall' supports the view that the right granted by § 706(a) is presumptive rather than absolute." *Ponzini*, 277 B.R. at 404. Further, several courts have observed that Fed. R. Bankr.P. 1017(f)(2)'s requirements that conversion under § 706(a) be made on motion, filed and served as required by Fed. R. Bankr.P. 9013, along with Fed. R. Bankr.P.2002(a)(4)'s requirement of 20 days' written notice of a hearing on conversion, indicate that the "right" to convert under §706(a) is not absolute. *Id.* at 405.

II. Are there extreme circumstances constituting bad faith in this case?

[11] In *Kuntz*, the Panel concluded that a Chapter 7 debtor's three month delay in reporting a post-petition inheritance did

not rise to the level of bad faith. *Kuntz,* 233 B.R. at 585. There, the Panel explained that there was no evidence to support the conclusion that the debtor intended to hide the asset or that he purposefully shielded the asset from his creditors. *Id.* Acknowledging that the three month delay may indicate a subjective bad faith on behalf of the debtor, the Panel noted that such an implication was tempered by several factors: the debtor's voluntary disclosure of the asset prior to entry of the discharge, his subsequent cooperation with the trustee, preservation of the asset, and prompt retention of a bankruptcy attorney for the purpose of filing a Chapter 13 plan. *Id.*

In *Cabral,* however, the Panel found that the debtor's actions did constitute extreme circumstances sufficient to deny conversion. *Cabral,* 285 B.R. at 575. There, the debtor had given misleading testimony at the § 341 meeting, filed amended schedules that differed substantially from her original schedules, and failed to include in either her Chapter 13 plan or Liquidation Analysis any reference to the likelihood of a substantial settlement offer from a personal injury claim. *Id.* Such actions caused the bankruptcy court to conclude that the debtor "was attempting to manipulate the Bankruptcy Code and to conceal the value of her personal injury claim from her creditors." *Id.* at 574. In affirming the bankruptcy court's order reconverting the debtor's case back to Chapter 7, [FN8] the Panel held that the unrebutted facts not only raised the inference of bad faith for purposes of § 1307(c), but also constituted "extreme circumstances" which are sufficient to deny conversion of the case from Chapter 7 to Chapter 13 under § 706(a). *Id.* at 575.

FN8. Unlike the instant case, in *Cabral* the bankruptcy court had converted the debtor's case to Chapter 13 immediately upon receipt of the notice of conversion. Accordingly, the bankruptcy court treated the objections as motions for reconsideration of the conversion, and ultimately entered an order reconverting the case back to Chapter 7.

In the instant case, the bankruptcy court, in denying the Debtor's request for conversion, concentrated on the Debtor's concealment of assets, or more specifically, on the concealment of the transfer of assets. The bankruptcy court stated that "there is an obligation on the part of people who file schedules in bankruptcy cases to get it right" and there is a "major presumption of bad faith when you have a grantor trust within a year of the bankruptcy and the property is not disclosed." App. at 41. The bankruptcy court concluded that "[t]his is a bad faith case." *Id.*

The Panel finds that the bankruptcy court's decision to deny conversion was sufficiently supported by the evidence before ***534** the court. The Debtor identified his interest in the Maine Property, denoting it as personal property on Schedule B at Question 18. The Debtor declared that "Debtor is 100% beneficiary of Bo-Mar Realty Trust the res of which is real property in Maine in which the debtor intends to live. Trust is a spendthrift trust." The Debtor valued his interest in the trust at zero. The Debtor did not, however, disclose in his answer to Question 10 on the Statement of Financial Affairs that he transferred the Maine Property into the trust within one year of the petition date. The Trustee's inquiry at the § 341 meeting into the nature of the trust and the transfer brought out the date of the transfer and that the Debtor had transferred his own property, for no consideration, into a revocable trust,

for which his girlfriend was the trustee. At the same time, the Debtor also admitted that the transfer was made for the purpose of protecting the Maine Property. While the Debtor argued that the failure to list the transfer was a mistake, his failure to list it was consistent with his intent to protect it. Moreover, the Debtor did not seek to amend Schedule B and the Statement of Financial Affairs until September 15, 2003, that is, after the bankruptcy court denied his motion to convert to Chapter 13.

Other factors also support the bankruptcy court's decision to deny conversion. On March 11, 2003, when the Debtor filed this petition, he claimed a homestead exemption in the Massachusetts Property. On March 24, 2003, the Debtor filed a motion seeking to avoid liens on the Massachusetts Property as impairing his homestead exemption. He filed a memorandum in support of his motion on May 27, 2003. At the continuation of the § 341 hearing, held on April 24, 2003, the Debtor testified that he was residing at the Maine Property and had been doing so for a couple of months. The Debtor also testified that beginning on May 1, 2003, he would begin receiving rental income from the Massachusetts Property. Likewise, on Schedule B, the Debtor answered Question 18, indicating that he intended to live at the Maine Property. Thus, the Debtor's actions in claiming an exemption in the Massachusetts Property and seeking to avoid liens against it were not consistent with his intended and actual move to the Maine Property. We conclude that the Debtor attempted to obtain a homestead exemption in property in which he did not intend to reside.

Furthermore, the Debtor also failed to list the tax refund. In Schedule B, Item 17, the Debtor is directed to identify

liquidated debts, including tax refunds. The Debtor's response, under oath, was "none." At the hearing on the request for conversion, Debtor's counsel contended that the Debtor filed an amended tax return in July of 2002, seeking the refund. Thus, his alleged lack of awareness of the refund is incompatible with the fact that he applied to the Internal Revenue Service for the refund.

Finally, the Debtor contends that he sought conversion because he became employed and began receiving rental income. However, prior to his request for conversion, the Trustee indicated his intention of seeking to recover the Maine Property. The Trustee also sought and obtained an extension of time to file a complaint objecting to discharge. Thus, the timing of the Debtor's request for conversion is suspect.

The Debtor's actions in the instant case were more egregious than the debtor's actions in *Kuntz.* Unlike the debtor in *Kuntz,* who simply delayed the disclosure of a post-petition asset, this Debtor appears to have taken affirmative attempts to conceal assets from creditors, beginning with the pre-petition transfer of the Maine Property into a revocable trust. Then, the ***535** Debtor made affirmative misrepresentations on his schedules regarding his homestead exemption, the value of his interest in the Trust, and the rental income generated by the Massachusetts Property. Additionally, the Debtor did not initiate disclosure of the assets, and only did so when asked direct questions at the § 341 meeting. Thus, this Debtor did not take steps to preserve his assets for the benefit of his creditors like the debtor in *Kuntz* did; instead, the intent behind the Debtor's transfer of the Maine Property for no

consideration was to preserve the asset for his personal benefit, and place it beyond the reach of his creditors.

Furthermore, while the debtor in *Cabral* acted egregiously in regard to concealment of one asset, this Debtor's actions are arguably more egregious because there seems to have been a pattern of attempts to conceal assets--a pattern that began before the Debtor filed his petition when he transferred the Maine Property for no consideration to the Trust, and continued post-petition until the Chapter 7 Trustee threatened action to recover the Maine Property. As has been stated by the United States Supreme Court, the opportunity provided by the bankruptcy law for a "fresh start" is limited to the "honest but unfortunate debtor." *Grogan v. Garner,* 498 U.S. 279, 286-87, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

Accordingly, we resolve, in conformity with our prior decisions in *Kuntz* and *Cabral,* that the bankruptcy court has authority to deny a debtor's request for conversion to Chapter 13. The Panel is not persuaded to overturn the rationale of its previous decisions and find that the debtor's right to convert pursuant to 11 U.S.C. § 706(a) is absolute and not subject to any judicial discretion despite the circumstances of the conversion. The bankruptcy court was correct in denying the Debtor's request for conversion because of the existence of "extreme circumstances" constituting bad faith.

CONCLUSION

For the reasons discussed above, the bankruptcy court's order denying the Notice of Conversion is AFFIRMED.

1st Cir.BAP (Mass.),2004.

In re Marrama

313 B.R. 525

United States Court of Appeals, First Circuit.
In re Robert Louis **MARRAMA,** Debtor.
Robert Louis **Marrama,** Appellant,
v.
Citizens Bank of Massachusetts and Mark G. DeGiacomo,
Chapter 7 Trustee, Appellees.
No. 04-9009.

Heard March 8, 2005.
Decided Oct. 31, 2005.

Appeal from the Bankruptcy Appellate Panel of the First Circuit.

David G. Baker, for appellant.

Mark G. DeGiamomo, with whom Olga L. Bogdanov and Murtha Cullina LLP were on brief for appellee Mark G. DeGiacomo.

Jack J. Mikels, Michael A. Wirtz, Janell E. DeGennaro, and Jack Mikels & Associates on brief for appellee Citizens Bank of Massachusetts.

Lynn F. Riley, with whom Gary Klein, Roddy, Klein & Ryan, and John Rao, National Consumer Law Center, were on brief for Amicus Curiae, National Association of Consumer Bankruptcy Attorneys.

Before HOWARD, Circuit Judge, CYR and STAHL, Senior Circuit Judges.

CYR, Senior Circuit Judge.

Robert Louis Marrama appeals from the bankruptcy court order which rejected his petition to convert these proceedings from chapter 7 to chapter 13, based on its determination that Marrama had attempted to conceal assets from creditors. We affirm.

I
BACKGROUND

In August 2002, Marrama transferred residential real estate in York, Maine, having an unencumbered value of $85,000, to a revocable spendthrift trust, for no consideration, and designated himself sole beneficiary and his girlfriend sole trustee. Marrama's acknowledged intent was to protect the property from the claims of creditors. Seven months later, he submitted a voluntary chapter 7 petition, together with a statement of financial affairs wherein he (i) disclosed that he was the Trust's beneficiary, (ii) listed the value of its *res* as zero, (iii) denied making any property transfers within one year preceding the filing of the chapter 7 petition, and (iv) asserted that the IRS owed him no tax refunds. [FN1] Whereas, Marrama was due a tax refund exceeding $11,000.

In June 2003, the chapter 7 trustee questioned Marrama regarding these apparent discrepancies. Rather than responding, Marrama filed notice in the bankruptcy court, pursuant to Bankruptcy Code ß 706(a), seeking to convert the chapter 7 case to a chapter 13 debt-restructuring proceeding, based upon his contention that, more recently, he had acquired additional rental income and gainful employment. The chapter 7 trustee opposed the conversion on the ground that Marrama intentionally failed to disclose in his schedules the preferential transfer of the Maine property

into the trust some seven months prior to his chapter 7 petition, as well as his anticipated federal tax refund. The debtor contended that these misstatements and omissions were inadvertent.

Following a non-evidentiary hearing, the bankruptcy court refused to permit the conversion to chapter 13, on the ground that the deceptive statement of financial affairs demonstrated Marrama's "bad faith." Marrama appealed to the BAP, which affirmed. In re Marrama, 313 B.R. 525 (BAP 1st Cir.2004). [FN2] The present appeal fails as well.

II
DISCUSSION

On an appeal from a BAP decision, we review *de novo* the legal determinations of the bankruptcy court, and its findings of fact for clear error. *See* Brandt v. Repco Printers & Lithographics, Inc. (In re Healthco Int'l, Inc.), 132 F.3d 104, 107-08 (1st Cir.1997).

A. *Section 706(a) and "Bad Faith" Conversion*

The initial issue on appeal is whether Bankruptcy Code ß 706(a) confers any discretion upon the bankruptcy court to forfend against "bad faith" conversions to chapter 13, or the debtor has an "absolute" right to convert. Interpretation of subsection 706(a) presents a pure issue of law, engendering *de novo* review. *See* HSBC Bank USA v. Branch (In re Bank of New England Corp.), 364 F.3d 355, 361 (1st Cir.), *cert. denied,* --- U.S. ----, 125 S.Ct. 318, 160 L.Ed.2d 225 (2004). Subsection 706(a) provides:

> The debtor *may* convert a case under this chapter [*viz.*, chapter 7] to a case under chapter 11, 12, or 13 of this title *at any time,* if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

11 U.S.C. ß 706(a) (emphasis added). Thus, section 706 imposes two plainly expressed limitations upon a debtor's right to convert: the debtor (i) must not previously have converted the case; and (ii) must meet the eligibility requirements for the chapter to which he intends to convert, *see* 11 U.S.C. ß 706(d). With respect to a conversion to chapter 13, for example, the debtor must have a regular income, unsecured debts less than $307,675, and secured debts less than $922,975. *See id.* ß 109(e).

As always, first we must inquire whether the plain language of subsection 706(a) resolves the interpretive issue, and, if so, its manifest meaning must control. *See* In re BankVest Capital Corp., 360 F.3d 291, 297 (1st Cir.), *cert. denied,* --- U.S. ----, 124 S.Ct. 2874, 159 L.Ed.2d 776 (2004). At the outset it must be noted that subsection 706(a) is to be viewed in light of a fundamental canon of the Bankruptcy Code: a bankruptcy court sitting in equity is duty bound to take all reasonable steps to prevent a debtor from abusing or manipulating the bankruptcy process to undermine the essential purposes of the Bankruptcy Code, including the principle that all the debtor's assets are to be gathered and deployed in a bona fide effort to satisfy valid claims. *See* United States v. Mourad, 289 F.3d 174, 178 (1st Cir.2002) (noting that Bankruptcy Code §105(a) enables the bankruptcy court to "tak[e] any action or mak[e] any determination

necessary or appropriate to ... prevent an abuse of [the bankruptcy] process"). Whether or not the Bankruptcy Code §105(a) anti-abuse provision alone would warrant the bankruptcy court's decision to deny Marrama a subsection 706(a) conversion, that provision indeed looms large in determining whether Congress envisioned that subsection 706(a) be construed as withholding all discretion where the bankruptcy court is confronted with a patently abusive motion to convert:

> Those who seek the shelter of the bankruptcy code [must] not play fast and loose with their assets or with the reality of their affairs. The statutes are designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction. As we have stated, "[t]he successful functioning of the bankruptcy act hinges both upon the bankrupt's veracity and his willingness to make a full disclosure."

Boroff v. Tully (In re Tully), 818 F.2d 106, 110 (1st Cir.1987) (citation omitted). Absent plain language to the contrary in subsection 706(a), therefore, we would be loathe indeed to disregard such an overarching legislative policy.

Turning to the particular language utilized in subsection 706 (a), we can discern no evidence that the Congress intended to override the presumptive power and responsibility of the bankruptcy court to weed out abuses of the bankruptcy process at any stage in the bankruptcy proceedings. Subsection 706(a) simply provides that the debtor "may" convert. The word "may" has at least two connotations. It can simply denote that a debtor has the option to convert, or not

convert. On the other hand, "may" often suggests conditionality, signifying that the event or status described is in no sense to be considered a foregone conclusion. Thus, the phrase "may convert" reasonably may suggest that the right to convert is merely presumptive, and may be exercised only if the debtor meets the preconditions for eligibility established in Bankruptcy Code ß 109(e), or even then only in the absence of other exceptional circumstances. *See* In re Finney, 992 F.2d 43, 45 (4th Cir.1993) (holding subsection 706(a) right not "absolute," but subject to bad-faith exception); Martin v. Martin (In re Martin), 880 F.2d 857, 859 (5th Cir.1989); In re Kuntz, 233 B.R. 580, 585 (BAP 1st Cir.1999). In other words, the debtor "may" succeed in an attempted conversion, but not necessarily in all conceivable instances.

Although Congress's mere use of the word "may" might not be conclusive in itself as to the existence or scope of the bankruptcy court's discretionary authority to deny a conversion, the statutory interpretation proffered by the trustee is bolstered as well by a comparison between Bankruptcy Code ß 706(a) and ß 1307(b), for example, which provides that "[o]n request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court *shall dismiss* a case under this chapter." (Emphasis added.) Subsection 1307(b) demonstrates that Congress well understood how to draft statutory language which left no (or at least considerably less) discretion in the bankruptcy court to deny a chapter 13 debtor's request. [FN2] The fact that subsection 706(a) contains no such imperative language strongly suggests that it confers a more restricted right upon the debtor, and that the bankruptcy court presumptively retains its discretionary

prerogative to deny conversion in some circumstances. *See* Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 346 (1st Cir. 2004) ("Congress's use of differential language in various sections of the same statute is presumed to be intentional and deserves interpretive weight."). [FN3]

Similarly, use of the phrase "at any time" in subsection 706(a) simply means that the debtor may seek to convert at any time during the pendency of the bankruptcy case, or in other words, that no artificial time constraints should impede an election to convert. Obviously, however, the temporal permissiveness of the phrase "at any time" hardly equates to the more broad circumstantial permission which Congress could have conferred, for example, by employing a phrase such as "regardless of the circumstances." *See* In re Copper, 314 B.R. 628, 636-37 (BAP 6th Cir. 2004); In re Young, 269 B.R. 816, 822 (Bankr.W.D.Mo.2001); In re Starkey, 179 B.R. 687, 692 (Bankr.N.D.Okla.1995).

Marrama points to the second sentence in subsection 706(a), which provides that "[a]ny waiver of the right to convert a case under this subsection is unenforceable," as evidence that Congress intended that the debtor not be able to divest himself of the right to convert, even where he allegedly abuses the bankruptcy process. Once again, however, in context this sentence functions strictly as a consumer protection provision against adhesion contracts, whereby a debtor's creditors might be precluded from attempting to prescribe a waiver of the debtor's right to convert to chapter 13 as a non-negotiable condition of its contractual agreements. *See* In re Copper, 314 B.R. at 637; *cf.* Bankruptcy Code ß 522(e) (referring to a similarly-worded exemption waiver, which was made "unenforceable," as one

"executed in favor of a creditor"). Subsection 706(a) contains no intimation that the debtor should be accorded protection against his own willful misconduct, such as an intentional abuse of the bankruptcy process. *See* In re Starkey, 179 B.R. at 692 (noting that such debtor misconduct is more akin to an "estoppel," than a "waiver").

In construing subsection 706(a), it is important to bear in mind that the bankruptcy court has unquestioned authority to dismiss a chapter 13 petition-- as distinguished from converting the case to chapter 13--based upon a showing of "bad faith" on the part of the debtor. *See* In re Cabral, 285 B.R. 563, 571-72 (BAP 1st Cir.2002); *see also* In re Alt, 305 F.3d 413, 418-19 (6th Cir.2002). We can discern neither a theoretical nor a practical reason that Congress would have chosen to treat a first-time motion to convert a chapter 7 case to chapter 13 under subsection 706(a) differently from the filing of a chapter 13 petition in the first instance.

The plain language of subsection 706(a) in no sense undermines the presumptive authority of the bankruptcy court to take reasonable steps to thwart debtor abuse of the bankruptcy process. However, even assuming *arguendo* that subsection 706(a) were ambiguous, we would look to the statute's "historical context, its legislative history, and the underlying policies that animate its provisions." In re Weinstein, 272 F.3d 39, 48 (1st Cir.2001); *see* In re LAN Tamers, Inc., 329 F.3d 204, 210 (1st Cir.2003) (noting that court may rely upon legislative history to corroborate meaning derived from plain statutory language).

The present controversy over the meaning of subsection 706 (a) is traceable not to the plain language of subsection 706(a),

but largely to its legislative history, which describes the debtor's right to conversion as "absolute," or as a "matter of right":

> Subsection (a) of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case. If the case has already once been converted from Chapter 11 or 13 to Chapter 7, then the debtor does not have that right. The policy of the provisions is that the debtor should always be given the opportunity to repay his debts.

H.R.Rep. No. 95-595, at 380 (1977); S.Rep. No. 95-989, at 94 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880.

The term "absolute" is problematic, if taken out of context, in that it implies that the debtor's conversion right is unconditional. We are not at liberty to take the term so literally, however, since subsections 706(a) and 109(e) make clear that numerous conditions exist which might defeat the debtor's motion to convert. *See* 9 Lawrence W. King, *Collier on Bankruptcy* ∂ 1017.05[1], at 1017-9 to 1017-10 (1998) ("Section 706(a) permits the debtor, as a matter of right, to convert a liquidation case to a case under chapter 11, 12, or 13 *if the case has not previously been converted from one of those chapters to chapter 7.*") (emphasis added). Therefore, in context the term "absolute" likely constitutes a recognition either that the debtor may convert *once* as a matter of right, but may not engage in successive conversions, or that the debtor's right to conversion cannot be waived by contract.

It is the pronounced policy of subsection 706(a) "that the debtor should always be given the opportunity to repay his

debts," H.R.Rep. No. 95-595, at 380, thus should be given one chance to effectuate a viable chapter 13 plan. It is plainly implicit in this legislative observation, however, that such an opportunity is to be accorded only to *honest* debtors. *See In re Spencer,* 137 B.R. 506, 512 (Bankr.N.D.Okla.1992) ("Where conversion to [chapter] 13 amounts to an attempt to escape debts rather than to repay them, the reason for the rule ceases--and there the rule ceases also."); *see also In re Marcakis,* 254 B.R. 77, 81 (Bankr.E.D.N.Y.2000). Nothing in the legislative history remotely negates nor undermines the overarching principle that the bankruptcy courts are duty bound to take all reasonable steps to preclude debtors from abusing or manipulating the bankruptcy process in order to undermine the essential purposes of the Bankruptcy Code.

Marrama advances two additional policy-related arguments. First, he notes the supposed irony that the bankruptcy reform legislation recently enacted by Congress aims to encourage more debtors to file chapter 13 petitions and thus undertake voluntary repayment of their debts, whereas the bankruptcy court here prematurely short-circuited his nascent attempt to do so. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. 109-8, ß 215, 119 Stat. 23 (2005). This argument is unpersuasive. The language of subsection 706(a) remains unchanged under the new act, and Marrama has not suggested that there is any other specific Bankruptcy Code amendment which would affect our interpretation of subsection 706(a). Rather, the purport of the bankruptcy reform legislation is to compel some debtors presently eligible to file chapter 7 debt-liquidation cases to opt for the less debtor-friendly, debt-restructuring chapter 13 regime, thus making it impossible for those debtors to obtain an absolute discharge of their debts. *See In re Hill,* 328 B.R.

490, 500 (Bankr.S.D.Tex.2005) (discussing reform bill). A legislative policy aimed at encouraging able debtors to undertake the voluntary repayment of their lawful credit obligations plainly is not served where the bankruptcy court has determined, as a threshold finding of fact, that the debtor is utilizing his subsection 706(a) conversion rights to advance an ongoing scheme to retain his non-exempt assets from bona fide creditors.

***6** Finally, Marrama notes that the Code accords the bankruptcy court discretion to reconvert a chapter 13 case to chapter 7 at a subsequent stage in the proceedings where the debtor has acted in "bad faith," *see In re Copper,* 314 B.R. at 365, and therefore that subsection 706(a) should not be construed as authorizing a largely duplicative remedy. We disagree. First, it would ill serve general policies aimed at promoting the efficient administration of bankruptcy cases to insist that a bankruptcy court--already confronted with clear evidence of a debtor's bad faith--must indulge in the technical formality of converting the chapter 7 case to chapter 13, knowing full well that eventually the case must be reconverted by reason of that same evidence of bad faith. *See Kowal v. Malkemus* (*In re Thompson*), 965 F.2d 1136, 1145 (1st Cir.1992) (noting "the important policy favoring efficient bankruptcy administration"). Absent some plausible policy justification for such pointless spinning of judicial wheels, we cannot construe subsection 706(a) as requiring it.

Moreover, these two remedies are neither inherently nor necessarily duplicative. Thus, for example, the bankruptcy court could invoke its power to reconvert a case, even though the debtor did not submit the subsection 706(a) conversion motion in bad faith, but subsequent to the conversion the

debtor engaged in bad-faith conduct which justified reconversion to chapter 7. Congress may well have envisioned--altogether reasonably--that the bankruptcy court could nip in the bud manipulative conduct on the part of a "bad faith" debtor at the moment of conversion, pursuant to subsection ß 706(a), rather than only after the case has been converted.

For all these reasons, we conclude that subsection 706(a) permits the bankruptcy court to deny a chapter 13 debtor's subsection 706(a) motion to convert where the court determines that the debtor engaged in bad faith conduct. We now turn to an assessment of the determination of bad faith made by the bankruptcy court.

B. *The Finding of "Bad Faith "*

Marrama maintains that the bankruptcy court erred in finding that he acted in "bad faith" by attempting to conceal assets from creditors by means of misrepresentations and material omissions of fact in his chapter 7 schedules. Marrama contends that (i) the schedules merely failed to disclose his recent transfer of the Maine property into the trust, yet did not conceal the existence of the property itself; (ii) the former omission was merely the result of scrivener error, with no intent to conceal; (iii) the statement, in Schedule B--that the res property had no value--was not false, notwithstanding its stated market value of $85,000, in that Marrama harbored a good-faith belief that the "spendthrift" nature of the trust prevented it from becoming property of the chapter 7 estate in the first instance; and (iv) the bankruptcy court determination is not supported by competent evidence, since the court did not convene an evidentiary hearing.

*7 As "good faith" is a fact-intensive determination to be made on a case-by-case basis, we review the instant finding as to "bad faith" for clear error only. *See In re Sullivan,* 326 B.R. 204, 212 (BAP 1st Cir.2005). A finding of fact cannot constitute clear error where competent record evidence supports it, nor is a reversal in order unless the court is "left with the definite and firm conviction that a mistake has been committed." *In re Hannigan,* 409 F.3d 480, 482 (1st Cir. 2005) (citation omitted). In assessing the totality of the circumstances, the bankruptcy court may consider, *inter alia,* (i) the accuracy of the debtor's financial statements; (ii) any other attempts by the debtor to mislead the bankruptcy court or manipulate the bankruptcy process; (iii) the type of debt sought to be discharged; (iv) whether the debt is dischargeable in chapter 7; and (v) the debtor's motivation in seeking to convert to chapter 13. *See Sullivan,* 326 B.R. at 212.

As the bankruptcy court determination that Marrama engaged in "bad faith" conduct is amply supported by the record, there can have been no clear error. The bankruptcy court is entitled to demand utmost good faith and honesty from debtors in the preparation of their schedules and statements of affairs. *See Hannigan,* 409 F.3d at 483. "The successful functioning of the bankruptcy [code] hinges both upon the bankrupt's veracity and his willingness to make a full disclosure." *In re Tully,* 818 F.2d at 110. Thus, concealment of assets is a long-recognized ground for rejecting a motion to convert a case. *See, e.g., In re Kuntz,* 233 B.R. at 583 (collecting cases); *In re Porter,* 276 B.R. 32, 37-38 (Bankr.D.Mass.2002) (denying debtor's motion to convert, due to failure to disclose transfer of assets within one year of filing bankruptcy petition).

The instant case comports in all material respects with the classic profile of playing fast and loose with the bankruptcy process. First, Marrama engaged in prepetition transfers of valuable property with the acknowledged intention of insulating the transfers from creditors, submitted a chapter 7 petition, then omitted to mention these same assets and transfers in the bankruptcy schedules, presumably in the expectation that the chapter 7 trustee would not discover their concealment. As the effort at camouflage failed, Marrama moved to convert the case to chapter 13, predicated upon the uncorroborated assertion that he was receiving regular income sufficient to entitle him to protection under chapter 13. Conveniently, the instant conversion (which Marrama characterizes as an "absolute" matter of right impregnable to challenge either by the trustee or the bankruptcy court) would divest the chapter 7 trustee of any authority to act in behalf of the estate to safeguard its assets. *See* Bankruptcy Code ß. 348 (e), 11 U.S.C. ß 348(e). Thus, in the event the debtor were to succeed in securing confirmation of a chapter 13 plan, he could reacquire his interest in "property of the estate," *as well as the concealed property.*

***8** Confronted with the profile presented by the instant case, the bankruptcy court readily could conclude that the Marrama disclosures demonstrated abundant indicia of intentional concealment. Question 10 unambiguously required Marrama to "[l]ist all other property, other than property transferred in the ordinary course of business or financial affairs of the debtor, transferred either absolutely or as security within one year immediately preceding the commencement of this case." Marrama responded: "None." The contention by counsel that Marrama simply forgot to include the transfer of the Maine

residence--which occurred a mere *seven months* before the chapter 7 petition filing--severely strains credulity. Not only was the Maine residence among Marrama's most valuable assets ($85,000), but Marrama conceded at the creditors' meeting that the transfer was made with the specific intent to avoid the claims of his creditors. *See, e.g., In re Weeden,* 306 B.R. 449, 459 (Bankr.W.D.N.Y.2004) (discrediting similar excuse by "intelligent, educated and financially sophisticated individual" for failure to disclose in Question 10 response a transfer proximate in time to the filing of the bankruptcy petition); *In re Carlson,* 231 B.R. 640, 656 (Bankr.N.D.Ill. 1999) (inferring fraudulent concealment where omitted transfer involved property transferred for no consideration and with specific intent to avoid creditors' claims against it). Further, by listing the value of the transferred property (or the trust *res*) as zero, Marrama made it less likely that the trustee would discover the preferential transfer, inasmuch as Marrama had made it appear that the trust may have never been funded.

The contention that Marrama honestly disclosed that the trust property value was zero strains credulity as well. Schedule B explicitly requires that the "current market value of debtor's interest in the property" be listed, rather than its value to the bankrupt estate. [FN4]

Finally, we reject the contention that, absent an evidentiary hearing, there was insufficient record support for the "bad faith" finding by the bankruptcy court. Marrama neither requested an evidentiary hearing, nor has he *yet* identified what additional material evidence could or would have been adduced at such a hearing. *See Cabral,* 285 B.R. at 577 (affirming, despite lack of evidentiary hearing on ground that

"[n]either counsel to the Debtor nor the Trustee indicated that there were facts in dispute or requested an opportunity to present evidence at the hearing").

Affirmed.

FN1. Moreover, in accompanying financial statements, Marrama claimed a homestead exemption in his Gloucester, Massachusetts residence. In affirming the bankruptcy court finding that Marrama had acted in bad faith, the Bankruptcy Appellate Panel ("BAP") noted that the homestead exemption appeared invalid on its face, since Marrama simultaneously claimed to be residing in Maine and to have received rental income from the Massachusetts property since May 2003, thus contradicting his assertion that it was a "residence" eligible for exemption. In the interim, however, the bankruptcy court has ruled that the Marrama homestead exemption claim is valid, *see In re Marrama,* 307 B.R. 332, 338-39 (Bankr.D.Mass.2004), hence we do not rely on this evidence in determining whether the bankruptcy court erred in finding bad faith.

FN2. Following the Marrama appeal, the Maine property was sold, *see In re Marrama,* 316 B.R. 418, 421-22 (BAP 1st Cir.2004) (holding that Marrama's power to revoke the trust became property of the chapter 7 estate, exercisable by the chapter 7 trustee), and Marrama was denied a chapter 7 discharge, *Citizens Bank of Mass. v. Marrama* (*In re Marrama*), No. 03-11987, 2005 WL 1106919, at *5 (D.Mass. May 9, 2005) (finding that Marrama had "intent to defraud" creditors, *see* Bankruptcy Code ß 727(a)(2)).

FN2. Our comparative analysis of subsections 706(a) and 1307(b) should not be construed as endorsing any particular interpretation of the latter section, such as one which would preclude the bankruptcy court from exercising its discretion to refuse to dismiss the chapter 13 case upon debtor's request. That issue is not before us to decide. *See, e.g., Sckolnick v. Harlow,* 820 F.2d 13, 15 (1st Cir.1987) ("[C]hapter 13 proceedings are wholly voluntary, and are subject to dismissal at any time at the debtor's request."). For present purposes, it suffices to note that the phrase "shall dismiss" is unquestionably a comparatively stronger imperative than "may convert."

FN3. The trustee points as well to Federal Rule of Bankruptcy Procedure 1017(f)(2), which requires that the debtor file a "motion" to convert under subsection 706(a), and to Rule 2002(a)(4), which requires that written notice of a hearing on such a motion be served 20 days prior to the hearing. The trustee argues that the fact that the debtor must file a "motion," rather than a mere "notice," suggests that the debtor's right to convert is conditional, not absolute. Ultimately, however, we find the applicability of Rules 1017(f)(2) and 2002(a)(4) inconclusive. Unquestionably, subsection 706(a) provides that the debtor's right to convert is at least conditioned upon some factual determinations, including the absence of any prior conversions to chapter 13, and the debtor's ability to meet the eligibility requirements to file a chapter 13 petition in the first instance, *see* 11 U.S.C. ß ß 706 (d); 109(e) (*e.g.*, unsecured debts less than $307,675).

Since parties in interest might contest such factual matters, at the very least the mere fact that the debtor must file a "motion" under ß 706(a) hardly demonstrates that Congress necessarily envisioned that the bankruptcy court might also condition conversion upon the debtor's "good faith." *See In re Croston,* 313 B.R. 447, 452-53 (BAP 9th Cir.2004). We would observe, however, that invocation of Rules 1017(f)(2) and 2002(a)(4) is in no sense incompatible with an interpretation which includes debtor "bad faith" among the conceivable contested matters to be addressed at a hearing.

FN4. We note as well that Marrama's asserted legal basis for stating that the Maine property never became part of the bankrupt estate is highly questionable. *See, e.g., Aylward v. Landry* (*In re Landry*), 226 B.R. 507, 510 (Bankr.D.Mass.2002) ("[A] spendthrift trust is ineffective against creditors if the settlor creates a trust for the settlor's own benefit and retains the power to amend, revoke or invade the principal of the trust."); *see also In re Marrama,* 316 B.R. at 421 (noting that, under Maine law, settlor retains power to revoke trust at any time, and this revocation power vests in the chapter 7 trustee).

--- F.3d ----, 2005 WL 2840634 (1st Cir.)

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